

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

MELANIE M. TANDIAMA and  
ANGELITO G. TANDIAMA, et al.,

Plaintiffs,

v.

NOVASTAR MORTGAGE, INC., et al.,

Defendants.

CASE NO. C03-909JLR

ORDER

**I. INTRODUCTION**

This matter comes before the court on Plaintiffs' Motion for Partial Summary Judgment (Dkt. # 145). Having reviewed all of the pleadings filed in connection with the underlying motion, the court GRANTS in part and DENIES in part Plaintiffs' motion for partial summary judgment.

**II. BACKGROUND**

Plaintiffs Melanie, Angelito, and Juliana Tandiamo<sup>1</sup> ("the Tandiams") filed suit against Defendant NovaStar Mortgage, Inc. ("NovaStar") alleging multiple state and federal law violations centering around NovaStar's undisputed failure to provide them

---

<sup>1</sup>Juliana Tandiamo passed away during the course of this litigation and as a result, Plaintiffs substituted the Estate of Juliana Tandiamo as a party to this action. See Third Am. Compl., Dkt. # 61.

1 with a written good faith estimate prior to closing indicating that NovaStar paid their  
2 mortgage broker a yield-spread premium (“YSP”) in connection with their loan.<sup>2</sup>  
3 NovaStar subsequently filed counterclaims against the Tandiamas alleging fraud,  
4 negligent misrepresentation, and civil conspiracy, based on false employment information  
5 contained in Juliana Tandiana’s loan application.<sup>3</sup> By filing the present motion,  
6 Plaintiffs seek partial summary judgment on NovaStar’s counterclaims and related  
7 affirmative defenses, and a ruling that NovaStar’s failure to disclose the YSP, in writing  
8 and before closing, constitutes an unfair and deceptive act under the Washington  
9 Consumer Protection Act (“CPA”).  
10

11 For purposes of this motion only, the Tandiamas concede that the following  
12 disputed facts are true in favor of NovaStar, the non-moving party. On February 14,  
13 2002, Juliana Tandiana signed a loan application falsely indicating her employment as a  
14 “resident manager” of an elderly home earning \$5,000.00 per month, when in reality she  
15 was a retired, 82-year-old receiving \$555.00 per month in social security payments.  
16 Despite these realities, the owner of Juliana Tandiana’s false place of employment,  
17  
18  
19

---

20  
21 <sup>2</sup>Although the Tandiamas originally filed suit (along with two other named Plaintiffs) on  
22 behalf of a class of similarly situated individuals, the court held that the fraud allegations  
23 surrounding the Tandiamas’ claim prevented them from serving as class representatives. Order,  
Dkt. # 137 at 17 (Nov. 23, 2004).

24 <sup>3</sup>Although NovaStar’s counterclaims for fraud and civil conspiracy also rest on its  
25 allegation that Juliana Tandiana’s loan application contained “falsely notarized documents” and  
26 Plaintiffs move for summary judgment on this basis, NovaStar appears to have dropped this  
27 allegation given that it devotes no briefing to this issue in opposition to summary judgment.  
28 Answer at ¶¶ 181, 191, 208. Thus, the court assumes that the alleged false employment  
information contained in Juliana Tandiana’s loan application provides the sole basis for  
NovaStar’s counterclaims.

1 Marietta Morales, verified Juliana Tandiana's employment in writing<sup>4</sup> and in a telephone  
2 call with a NovaStar employee. Juliana Tandiana reaffirmed her false employment  
3 information at closing on April 16, 2002 in her final loan papers. NovaStar contends that  
4 these acts reveal the Tandiamas' scheme, along with their mortgage broker, Marjorie  
5 Gabriel, to defraud it after earlier attempts to refinance their home failed as a result of  
6 Melanie and Angelito Tandiana's unfavorable credit rating and debt level.  
7

8 It is undisputed that Melanie and Angelito Tandiana deeded their interest in their  
9 jointly owned home to Juliana Tandiana (Angelito's mother) to enable her to obtain a  
10 mortgage loan on their behalf. Juliana Tandiana applied for a "stated income" loan<sup>5</sup> from  
11 NovaStar which requires borrowers (1) to have a credit score of 660, (2) no late mortgage  
12 payments for the past two years, and (3) verified employment. On March 13, 2002,  
13 NovaStar obtained Juliana Tandiana's credit report which listed her average credit score  
14 as 660 and did not list any late mortgage payments. The credit report also indicated,  
15 however, that at least one agency reported Juliana Tandiana as being "retired" and  
16 "unemployed." NovaStar did not inquire into this discrepancy or require additional  
17 information from Juliana Tandiana regarding her alleged employment, such as a W-2  
18 statement or pay stub. Instead, NovaStar accepted Juliana Tandiana's loan application  
19 upon verifying her employment.  
20

21 The parties also do not dispute that NovaStar and its mortgage broker never  
22 provided the Tandiamas with a written good faith estimate disclosing the YSP paid in  
23

---

24 <sup>4</sup>The court notes that the "Verification of Employment" form allegedly signed by Ms.  
25 Morales indicates Juliana Tandiana's employment at the elderly home without specifying her  
26 salary. Instead of listing Juliana Tandiana's pay rate, the form contains a large "X" over the grid  
27 where an employee's base pay, overtime, commissions, bonus, and other compensation, are  
normally listed. Weaver Decl., Exh. 6.

28 <sup>5</sup>This loan earns its name from NovaStar's practice of first verifying a borrower's  
employment and then relying on the borrower's stated income in the loan application.

1 connection with their mortgage, either at the time of extending credit or within three  
2 business days of receiving Juliana Tandiana's loan application. Although the Tandianas  
3 received two good faith estimates from NovaStar dated December 14, 2001, these  
4 estimates pre-date Juliana Tandiana's loan application by two months and her closing by  
5 four months. Further, the estimates disclose an anticipated interest rate of 9.25% and  
6 14%, as well as an anticipated "mortgage broker fee" of 2%. NovaStar contends that  
7 Gabriel verbally explained that it would pay a mortgage broker fee, or YSP, in connection  
8 with their mortgage and that the Tandianas did not object, although the Tandianas  
9 dispute that this conversation ever took place. Ultimately, NovaStar charged Juliana  
10 Tandiana an interest rate of 8.5% and paid her mortgage broker a YSP in the amount of  
11 \$2,460.00.  
12

### 13 III. DISCUSSION

#### 14 A. Legal Standard

15 Summary judgment is appropriate when the moving party demonstrates that there  
16 is no genuine issue as to any material fact and that the moving party is entitled to  
17 judgment as a matter of law. Fed. R. Civ. P. 56(c). The party moving for summary  
18 judgment "bears the initial responsibility of informing the district court of the basis for its  
19 motion, and identifying those portions of 'the pleadings, depositions, answers to  
20 interrogatories, and admissions on file, together with the affidavits, if any,' which it  
21 believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v.  
22 Catrett, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)).  
23

24 Once the moving party meets its initial responsibility, the burden shifts to the non-  
25 moving party to establish that a genuine issue as to any material fact exists. Matsushita  
26 Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). Evidence  
27 submitted by a party opposing summary judgment is presumed valid, and all reasonable  
28

1 inferences that may be drawn from that evidence must be drawn in favor of the non-  
2 moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). The non-  
3 moving party cannot simply rest on its allegation without any significant probative  
4 evidence tending to support the complaint. See U.A. Local 343 v. Nor-Cal Plumbing,  
5 Inc., 48 F.3d 1465, 1471 (9th Cir. 1995). “[A] complete failure of proof concerning an  
6 essential element of the non-moving party’s case necessarily renders all other facts  
7 immaterial.” Celotex, 477 U.S. at 322-23.

9 **B. NovaStar’s Counterclaims**

10 The Tandiamas contend that NovaStar’s counterclaims for fraud, negligent  
11 misrepresentation, and civil conspiracy all fail because NovaStar could not have  
12 justifiably relied on Juliana Tandiana’s false employment information in light of the  
13 March 13, 2002 credit report indicating her status as “retired” and “unemployed.” Given  
14 that both fraud and negligent misrepresentation require justifiable reliance as a necessary  
15 element, the court focuses its inquiry solely on whether NovaStar’s reliance on Juliana  
16 Tandiana’s false employment information was justified. Guarino v. Interactive Objects,  
17 Inc., 86 P.3d 1175, 1191 (Wash. Ct. App. 2004) (stating elements of fraud); Lawyers  
18 Title Ins. Cop. v. Baik, 55 P.3d 619, 623 (Wash. 2002) (stating elements of negligent  
19 misrepresentation). Drawing all reasonable inferences in favor of NovaStar and assuming  
20 that Juliana Tandiana knowingly misrepresented her employment information on her  
21 loan application, the court finds that NovaStar’s reliance on such information was not  
22 justified and therefore dismisses NovaStar’s counterclaims and related affirmative  
23 defenses.  
24

25  
26 For both fraud and negligent misrepresentation claims, a party’s reliance is  
27 justified when it is “reasonable under the circumstances.” Williams v. Joslin, 399 P.2d  
28 308, 309 (Wash. 1965); Lawyers Title, 55 P.3d at 626-27. A party with expert

1 knowledge and experience “to evaluate that which he sees and appreciate the obvious  
2 falsity of the claimed representation” cannot rely reasonably on another party’s  
3 representation. Puget Sound Nat’l Bank v. McMahon, 330 P.2d 559, 561 (1958).  
4 Further, a party’s right to rely on a representation is “inseparably connected” with the  
5 duty to use diligence in evaluating the representation. Skagit State Bank v. Rasmussen,  
6 745 P.2d 37, 41 (Wash. 1987) (citations omitted).  
7

8 Washington courts have repeatedly held that a party’s reliance is unreasonable  
9 where the party possesses written documents, knowledge, or expertise indicating the  
10 falsity of the representations at issue. Williams, 399 P.2d at 309 (buyer’s fraud claim  
11 precluded by his failure to examine receipts in his possession revealing that seller’s oral  
12 representation was false); McMahon, 330 P.2d at 561 (buyer’s many years of business  
13 experience and investigation of the property precluded her from claiming fraud); Hoel v.  
14 Rose, 105 P.3d 395, 398-99 (Wash. Ct. App. 2004) (buyers’ negligent misrepresentation  
15 claim dismissed for failure to investigate or resolve conflict between seller’s  
16 representation of the property boundaries and the pre-closing appraisal); Skagit, 745 P.2d  
17 at 41 (landowner prevented from using misrepresentation defense when he failed to read  
18 loan documents demonstrating the falsity of his partner’s misrepresentation); contra  
19 Lawyers Title, 55 P.3d at 628 (plaintiff justifiably relied when it “had nothing before it  
20 that would have contradicted the written assurances” of defendant).  
21

22 Here, it is undisputed that NovaStar possessed a credit report, approximately one  
23 month prior to closing, indicating that Juliana Tandiana was 82 years old, retired, and  
24 unemployed. NovaStar’s employment verification form on file for Juliana Tandiana  
25 indicated her employment at the elderly home, but omitted any information about her  
26 income. Weaver Decl., Exh. 6. Rather than verifying her alleged \$5,000.00 per month  
27 salary, the form contains three large “X’s” over the categories listing an applicant’s base  
28

1 pay, overtime, commissions, and bonus, among other things. Crossed out in the areas of  
2 income verification, NovaStar's form fails to state any income for Juliana Tandiana.  
3 NovaStar's reliance on this form was unreasonable in light of its own policy to verify the  
4 "income stated" on an employment verification form for W-2 wage earners, such as  
5 Juliana Tandiana, and to assess whether it is "reasonable for the nature and length of  
6 employment."<sup>6</sup> Weaver Decl., Exh. 2 at NS 008760. Further, the March 13, 2002 credit  
7 report demonstrated the falsity of Juliana Tandiana's alleged employment.  
8

9 NovaStar's reliance on bankruptcy cases applying the fraud exception under 11  
10 U.S.C. § 523(a)(2)(A) is unavailing.<sup>7</sup> While the court recognizes the Ninth Circuit's  
11 holding that Washington's common law fraud claim mirrors the bankruptcy code's fraud  
12 exception for purposes of collateral estoppel, the court finds that none of the bankruptcy  
13 cases applying this exception alter or conflict with its holding. In re Diamond, 285 F.3d  
14 822, 827-28 (9th Cir. 2002) (holding "reliance issues in the [Washington] state law  
15 fraudulent misrepresentation claim are identical to those in the nondischargeability claim  
16 under § 523(a)(2)(A)"). Moreover, the bankruptcy and Washington cases NovaStar relies  
17 on support Washington's well-established principle precluding a party from claiming  
18 fraud where the party has information, knowledge, or experience indicating the falsity of  
19  
20

---

21  
22 <sup>6</sup>The court notes that NovaStar also possessed expertise in the area of subprime lending  
23 (*i.e.*, providing mortgage loans to borrowers with unfavorable credit or low income) given its  
24 position as one of the largest lenders of its kind. Weaver Decl., Exh. 1 at 2 (listing NovaStar as  
25 the 21st largest subprime lender). NovaStar's expertise provides another potential basis  
26 suggesting NovaStar's reliance was unreasonable in light of the circumstances. See McMahon,  
330 P.2d at 561 (holding buyer's many years of business experience and investigation of the  
property prevented her from claiming fraud).

27 <sup>7</sup>As a general matter, the court finds NovaStar's citation to out-of-circuit, district  
28 bankruptcy cases unhelpful and unnecessary given that the court must determine whether the  
Tandianas' alleged conduct constitutes fraud and negligent misrepresentation under Washington  
law.

the alleged misrepresentation. See, e.g., Field v. Mans, 516 U.S. 59, 71 (1995) (describing justifiable reliance as requiring a person “to use his senses,” and preventing recovery where a person “blindly relies upon a misrepresentation the falsity of which would be patent to him if he had utilized his opportunity to make a cursory examination or investigation.”) (internal citation omitted); Westby v. Gorsuch, 50 P.3d 284, 293 (Wash. Ct. App. 2002) (noting justifiable reliance “involves the question of [the plaintiff’s] diligence in ascertaining the facts for himself . . . [and] his exercise of care and judgment in acting upon representations which run counter to knowledge within his possession or reach.”) (quoting Rummer v. Throop, 231 P.2d 313, 319 (Wash. 1951)).

Thus, the court finds that NovaStar’s reliance was not justified under the circumstances and DISMISSES its counterclaims for fraud, negligent misrepresentation, and civil conspiracy,<sup>8</sup> as well as its related affirmative defenses.<sup>9</sup>

### **C. The Tandiamas’ CPA Claim**

The Tandiamas also seek a partial summary judgment ruling that NovaStar’s failure to provide them with a timely, written good faith estimate disclosing the YSP paid to their broker in connection with their mortgage, under the Real Estate Settlement

---

<sup>8</sup>NovaStar’s civil conspiracy counterclaim is predicated on its fraud claim. Answer at ¶¶ 207, 209, 211; Def. Resp. at 18 (“the evidence shows that Melanie and Juliana Tandiana combined with each other and with Ms. Gabriel to fraudulently acquire two mortgage loans from NovaStar”). Given that NovaStar’s fraud claim is not actionable, the court must dismiss NovaStar’s counterclaim for civil conspiracy. Northwest Laborers-Employers Health & Sec. Trust Fund v. Philip Morris, Inc., 58 F. Supp. 2d 1211, 1216 (W.D. Wash. 1999) (recognizing Washington civil conspiracy claims “must be premised on underlying ‘actionable wrongs’” and consequently fail “if the underlying act or claim is not actionable”) (internal citations omitted).

<sup>9</sup>The court specifically dismisses NovaStar’s fourth affirmative defense (contributory negligence, mistake, fraud), ninth affirmative defense (estoppel), sixteenth affirmative defense (any defense based on legal or equitable grounds), and seventeenth affirmative defense (misrepresentation and fraud) to the extent the defenses are based on the Tandiamas’ alleged scheme to defraud NovaStar.



1 Procedures Act (“RESPA”), constitutes an unfair and deceptive practice under the CPA  
2 as a matter of law. RESPA requires that a lender or mortgage broker provide a borrower  
3 with a written good faith estimate disclosing the costs and fees incurred with the  
4 mortgage before the credit is extended, or within three days of receiving the loan  
5 application, whichever happens first. 12 U.S.C. § 2604(c); 15 U.S.C. § 1638(b)(2); 24  
6 C.F.R. § 3500.7(a), (b). The good faith estimate must include “indirect payments or  
7 back-funded payments to mortgage brokers” arising from the mortgage transaction,  
8 including “a mortgage broker fee,” otherwise known as a YSP. 24 C.F.R. § 3500, App.  
9 A, Section L; 24 C.F.R. § 3500, App. C (sample form of good faith estimate). Two  
10 courts in this district have held that a creditor’s failure to provide timely disclosure under  
11 RESPA constitutes an unfair and deceptive practice under the CPA. Anderson v. Wells  
12 Fargo Home Mortgage, Inc., 259 F. Supp. 2d 1143, 1147-48 (W.D. Wash. 2003); Brazier  
13 v. Sec. Pac. Mortgage, Inc., 245 F. Supp. 2d 1136, 1142 (W. D. Wash. 2003).

14  
15 Here, it is undisputed that NovaStar failed to provide the Tandiamas with a written  
16 good faith estimate disclosing the YSP paid in connection with their mortgage before the  
17 earlier of (1) extending credit or (2) within three days of receiving Juliana Tandiana’s  
18 loan application. The two December 14, 2001 good faith estimates received by the  
19 Tandiamas pre-date Juliana Tandiana’s loan application by two months and the loan  
20 closing by four months. Marjorie Gabriel, the Tandiamas’ mortgage broker, confirmed at  
21 her deposition that the Tandiamas failed to receive a timely, written good faith estimate  
22 by testifying that she *orally* explained the YSP to the Tandiamas at closing but “I don’t  
23 put anything in writing.” Weaver Decl., Exh. 13 at 2; Brown Decl., Exh. 15, at 124.  
24 Consistent with other courts in this district, the court finds that the failure to provide a  
25 timely, written good faith estimate disclosing the YSP paid to a mortgage broker  
26  
27  
28

1 constitutes an unfair and deceptive practice under the CPA. Anderson, 259 F. Supp. 2d at  
2 1147-48; Brazier, 245 F. Supp. 2d at 1142.

3 NovaStar's attempts to discredit this holding by arguing that the CPA exempts  
4 transactions regulated under federal law, and its reliance on two unpublished bankruptcy  
5 cases from this district for this proposition, are unavailing. In relevant part, the CPA  
6 provides, "[n]othing in this chapter shall apply to . . . actions or transactions permitted by  
7 any other regulatory body . . . [of] the United States." RCW § 19.86.170. NovaStar has  
8 failed to identify a regulatory body permitting its conduct (*i.e.*, its failure to provide a  
9 timely, written good faith estimate). Indeed, RESPA and Washington law require  
10 conduct to the contrary.<sup>10</sup> Further, the two unpublished bankruptcy decisions upon which  
11 NovaStar relies fail to address the issue at hand and therefore fail to compel a different  
12 result. The bankruptcy court determined that the federal Truth in Lending Act,  
13 Depository Institution Deregulation and Monetary Control Act, and Federal Trade  
14 Commission Act governed whether a state-chartered bank provided adequate disclosure  
15 of charges and whether the charges were legal. In re McDonald, No. 03-13790, slip op.  
16 at 6 (Bankr. W.D. Wash. May 4, 2004); In re Williams, No. 04-10712, slip op. at 6  
17 (Bankr. W.D. Wash. Jan. 27, 2005) (incorporating by reference the legal analysis  
18 articulated in In re McDonald).

19 Nonetheless, the allegations of fraud concerning the Tandiamas, which this court  
20 must accept as true for purposes of summary judgment, prevent it from ruling that  
21 NovaStar's failure to provide a timely, written good faith estimate constitutes an unfair  
22  
23  
24

---

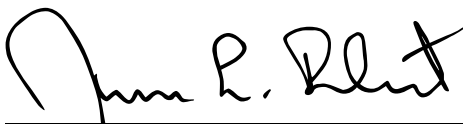
25  
26 <sup>10</sup>Washington's Mortgage Brokers Practice Act incorporates RESPA's disclosure  
27 requirements and requires a mortgage broker to provide a borrower with a written itemization or  
28 good faith estimate, within three days of receiving the borrower's loan application, specifying all  
fees and costs the borrower is required to pay in connection with the mortgage that will benefit  
the broker. RCW § 19.146.030(1), (2).

1 and deceptive practice under the CPA. “The CPA exists to protect consumers, not to aid  
2 and abet fraud.” Mutual of Enumclaw Ins. Co. v. Cox, 757 P.2d 499, 504 (Wash. 1988).  
3 Consequently, Washington courts have consistently rejected plaintiffs’ attempts to  
4 recover under the CPA where they have engaged in fraud. Id.; Tornetta v. Allstate Ins.  
5 Co., 973 P.2d 8, 12 (Wash. Ct. App. 1999); Wickswat v. Safeco Ins. Co., 904 P.2d 767,  
6 774 (Wash. Ct. App. 1995). Whether the Tandiamas engaged in a scheme to defraud  
7 NovaStar is a hotly contested issue of material fact, which can only be resolved at trial. If  
8 the fact finder determines that the Tandiamas engaged in fraud, then their CPA claim  
9 must fail as a matter of law. E.g., Wickswat, 904 P.3d at 774 (“we find that the trial court  
10 in this case correctly directed the jury not to consider [plaintiff’s] bad faith and CPA  
11 violation claims if it found that he intentionally misrepresented or concealed material  
12 facts during the claims process.”). Thus, the court DENIES the Tandiamas’ motion for  
13 partial summary judgment on this issue and reserves it for trial.  
14

#### 15 IV. CONCLUSION

16  
17 For the reasons stated above, the court GRANTS in part and DENIES in part  
18 Plaintiffs’ Motion for Partial Summary Judgment (Dkt. # 145). NovaStar’s Motion for  
19 Partial Summary Judgment (Dkt. # 158), filed in opposition to Plaintiffs’ motion and re-  
20 noted by agreement of the parties to July 1, 2005, is moot in light of this court’s decision.

21 Dated this 31st day of May, 2005.

22  
23  
24 

25 JAMES L. ROBERT  
26 United States District Judge  
27  
28